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No. 577 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1957

CLIFFORD L. DUKE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion (C. A. 3–15)[1] of the Court of Appeals has not yet been reported.

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[1] The Court of Appeals proceedings appear in a volume entitled Volume 37 of the transcript of record, but this volume is not paginated in accordance with the other volumes. Therefore, the Court of Appeals proceedings are referred to herein as "C. A.". The rest of the transcript is referred to as "R.".

Pagination within the volumes also requires explanation. Volume 1 of the transcript begins with the day on which the jury was chosen (August 3, 1955) and includes pages 1–165, but does not contain a transcript of the jury impanelment. A separate unnumbered volume entitled "Jury Impanelment" contains these proceedings in the following pages; 36, 36–A–1 to 36–A–171. A second unnumbered volume entitled "On Appeal" con-

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1958 (C. A. 17). A petition for rehearing was denied on January 22, 1958 (C. A. 16). On February 1, 1958, Mr. Justice Douglas extended the time within which to file a petition for a writ of certiorari to and including February 28, 1958, and the petition was filed on February 26, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner should have been allowed to discharge his attorney on the day of trial and conduct his whole defense alone, where petitioner had been granted permission to argue motions and examine witnesses personally, wanted his counsel to make the closing argument, but sought to discharge counsel solely because the trial court would not permit petitioner to make the opening statement in person.

STATEMENT

A ten-count indictment filed May 25, 1955, in the United States District Court for the Southern District of California, charged petitioner and others with smuggling and conspiring to smuggle psittacine birds

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tains a verbatim transcript of the proceedings had prior to trial in June and July, 1955, such as the arraignment and the hearings on motions; those numbers run from 1-A to 146-A, inclusive. Also on file with this Court is a volume entitled "Volume I" which contains the indictment, appearances, motions, requested instructions, etc., and a summary of the transcript. Each document is numbered separately and the summary of proceedings is identified by date alone. This volume is referred to as "Sum.".

(parrots, parakeets, etc.) into the United States from Mexico (Sum., Indict., p. 1–15). Count 1 charged petitioner with conspiring with thirteen other conspirators, not defendants, to smuggle birds from January to April, 1953 (Sum., Indict., p. 1–3). Count 4 charged that petitioner conspired with defendants Ballard and Buono, and five co-conspirators to smuggle birds from April, 1953, to December, 1954 (Sum., Indict., p. 6–8). Count 7 charged that petitioner and defendant Buono conspired with four others to smuggle birds during the period June through October, 1953 (Sum., Indict., pp. 11–12). Counts 2, 5, 8, 9, and 10 allege the smuggling of birds. Petitioner was the only one named in count 2. He was joined by Ballard and Buono in count 5, and by Buono in counts 8–10 (Sum., Indict., p. 4, 9, 13–15). Counts 3 and 6 charge the receipt, concealment, and facilitation of transportation of smuggled birds; count 3 as to petitioner alone, count 6 as to petitioner and defendants Ballard and Buono (Sum., Indict., p. 5, 10).

After trial by jury, petitioner was convicted on all ten counts and sentenced to a total of eleven years imprisonment. He was sentenced to five years imprisonment for each conspiracy, to run concurrently; two years for each of counts 2, 3, and 5, to run concurrently with each other but consecutively to the conspiracy sentences; two years for both counts 6 and 8, to run concurrently with each other but consecutively to counts 2, 3, and 5; and two years for each of counts 9 and 10, again to run concurrently as to each other but consecutively to counts 6 and 8 (R. 5189–

5190, 5318–5319). On appeal, the convictions were affirmed.

Petitioner, who is a lawyer, appeared for arraignment on June 3, 1955. At that time he asked leave of the court to appear in propria persona for the purposes of arraignment and motions, but assured the court that he would have counsel to represent him at the time of trial. Petitioner's request was granted (R. 2A–3A, 5A, 22A–23A, 26A).

On August 2, 1955, the day before the jury was selected in this case, Mr. Fitzgerald, an attorney, contacted the trial judge, informed him that he represented petitioner even though he had made no formal entry, and complained that the marshal would not permit him (Fitzgerald) to interview two prisoners who were to be defense witnesses. The court entered a minute order permitting both Fitzgerald and petitioner to interview the witnesses (R. 2–3). That order was withdrawn the following day (R. 19) when it developed that the prisoners were government witnesses and no official notice had been given to the government (R. 7–9). But at that time, the day the jury was chosen, Mr. Fitzgerald was present and acting for petitioner (R. 9, 12–13, 24, 26), and was accepted as his counsel (R. 27). At the close of the conference concerning the withdrawal of this minute order, Mr. Bowler, appearing for the government, observed that petitioner was present along with his counsel, whereas the co-defendants Ballard and Buono were represented but not present. Bowler asked what the court's procedure would be in future

conferences (R. 27). The following then took place (R. 28–35):

The COURT. Regardless of what the subject of the conference is, if you come to the chambers to see the judge, see that all defendants are here, and all defendants shall be represented.

Mr. BOWLER. Very well.

Mr. DUKE. Just for the record——

The COURT. Also, if Mr. Duke is represented by counsel here, then Mr. Duke should speak to the court through counsel, except when he gives evidence.

Mr. BOWLER. Very well.

Mr. DUKE. I am representing myself, your Honor, associating Mr. Fitzgerald.

The COURT. You can't do that. Is Mr. Fitzgerald of record.

Mr. DUKE. No, your Honor.

The COURT. Well, you had better get yourself a lawyer of record, or if you are going to defend yourself bear in mind the rule. Now I don't know how firm a rule it is, but it is a rule that those who give testimony cannot argue the case to the jury. And if you intend to testify, bear in mind that there are rules which would prevent your arguing the case to the jury, if you do that. If you want Mr. Fitzgerald to be your attorney, get him of record. If he is of record you cannot act in pro per or as an attorney with him.

Mr. FITZGERALD. Cannot be associated with him, in other words?

The COURT. No.

Mr. DUKE. I brought Mr. Fitzgerald here out of an abundance of kindness on his part, your

Honor, to do those things which I knew the rules would preclude myself from doing.

That being the case, Mr. Fitzgerald has agreed to come down and assist in those matters which would, I think, make it less awkward in the courtroom. But I have appeared for myself at all times here, and I would, like one of the other defendants, have two counsel. And if I may be permitted to act in the dual capacity and participate——

The COURT. What law allows it?

Mr. FITZGERALD. Well, I guess the law entitles counsel to associate anybody he wants.

* * *

Just as he says, if he is going to testify he can't very well argue the case. If some witness takes that witness stand and makes a personal attack on him, it isn't very becoming for him to get up there and quarrel with him. He had better have counsel do that.

* * * * *

The COURT. We have to be practical about the case——

Mr. FITZGERALD. That is right.

The COURT. ——And if there are rules of law which govern the situation, which there must be, although I suspect that a lot of them are what Justice Oliver Wendell Holmes said they were not. He said, "The law is not a brooding omnipresence in the skies, but is the articulate voice of a sovereign or quasisovereign." I don't know whether the sovereign has articulated on all the subjects.

But Mr. Duke is a member of the Bar of this court.

Mr. FITZGERALD. That is right.

The COURT. Mr. Duke is a defendant in this case. Mr. Duke is necessarily emotionally involved in it because he has, if he should be convicted here, more to lose than any other defendant.

I have not yet physically received the pretrial statement of the Government. All I know is from reading the indictment, but Mr. Duke is charged with enough to make his future professional life very dubious here if he should be convicted of any one of the counts.

Mr. FITZGERALD. That is right.

The COURT. Now, he being necessarily involved as a man would, emotionally in the problem, it is just not a good thing for him to be participating as an attorney in the courtroom.

You know Mr. Fitzgerald, how many times a lawyer will say or do things which will militate very strongly against him when he acts under the stress of emotion.

Mr. FITZGERALD. Yes.

The COURT. How much more is he apt to do that if he is both client and lawyer? I don't think it is practical.

Of course, you are in the position of having a client here who, being a lawyer and having had the experience he has had with early litigation which will be mentioned in this case, and facts which have been litigated in other cases, you can draw a great deal from just conferring. And I don't mean to indicate that you should not have the benefit of full conference with him, and we will recess whenever conferences are actually needed, if the requirements of justice are such we should do that.

But for Mr. Duke to undertake to examine witnesses or to argue motions or evidence, I think, it is very unwise from the standpoint of Mr. Duke himself, from the standpoint of having adequate control of his case, and from the standpoint of an orderly procedure here. I don't think if you give it serious consideration you will quarrel too much with the indication the court has made, that all questioning and argument should be made by you and not by you and Mr. Duke.

Mr. Duke. I didn't . . .—please of the court, I had never intended to argue the case. I realize the rule, that having testified myself, I wouldn't be permitted to argue nor would it be wise for me to argue my own testimony or any of the testimony. And I realize my own emotional feelings in the case.

However, as to certain matters, such as questions of law that might come up before your Honor that I am versed in, having gone through many motions of a similar character in the other case, and having filed a brief in the Court of Appeals for the Ninth Circuit on questions of law, I feel it would take . . . I could argue those without expending too much time in any additional research.

I think I could contain any emotions in your Honor's presence so I can present those arguments as an advocate and not as a defendant. I have heretofore appeared as my own counsel and argued the motions and have . . .

The Court. You haven't been indicted before, have you?

Mr. DUKE. I mean in this particular case, your Honor. All the motions heretofore I have argued on my own behalf.

The COURT. Do you have any objection to Mr. Duke participating in the argument on motions?

Mr. BOWLER. On motions?

The COURT. Yes.

Mr. BOWLER. None.

Mr. STEWART. That is out of the presence of the jury, I assume.

The COURT. They usually are. On motions which are being presented out of the presence of the jury the court will hear you, Mr. Duke.

Mr. DUKE. Then there is one more thing. There will probably be called one or two witnesses that I would like very much to examine myself. I won't share that examination with—that is, I wouldn't have two counsel on my behalf examining the witness, but it will not be very much. But I would like to reserve that right to examine one or two witnesses.

* * * * *

The COURT. Gentlemen, it appears to me so far as I can decide that matter, it must be decided on principles of law rather than upon principles of whether it is wise for Mr. Duke or pleasant for the litigants and other lawyers and witnesses.

Now, a man is always entitled to be represented by counsel of his own choosing. You have opposed to that the restrictions which are placed upon lawyers who also have other capacities in the case. I don't know at the moment whether I can restrict Mr. Duke and Mr. Fitzgerald from having Mr. Duke partici-

pate in the examination of witnesses. If I can I will, because I don't think he should do it.

It is inviting too much of the sort of thing which lawyers, in the heat of advocacy, as the appellate courts say, will do, which should not be done. It is inviting the argumentative question; which often to a venireman sounds like testimony, but is, in fact, interrogation. It is inviting the overstepping of a kind that a person, emotionally involved and personally involved as a litigant is, shouldn't do.

So if I can keep him from doing it I will, but I am not going to take away any of his legal rights. * * *

This conference, which had taken place in chambers, was terminated and the court turned to impaneling a jury (R. 35–36). At that time petitioner moved to associate Mr. Fitzgerald as his co-counsel in the case (R. 36–A–2). The court expressed doubt as to whether petitioner could be both his own lawyer and also represented by counsel. However, he resolved his doubts by permitting the association, saying (R. 36–A–3):

* * * I will allow Mr. Fitzgerald to be associated, with the understanding that he is to conduct the case, except argument of motions upon matters of law, with which you [petitioner] are more familiar, because you have had experience in other cases involving these matters of law.

I will keep under submission whether you may examine witnesses until tomorrow. If you have any law to the effect that you can, I will be happy to have it.

The following day the court gave petitioner permission to cross-examine witnesses, and the following exchange took place (R. 40–44):

> The COURT: Now, that there be no confusion about the participation of Mr. Duke, I think I indicated in yesterday's session that Mr. Duke is either under an obligation to appear in pro per or to be represented by counsel, but that a hybrid of the two is something to which he does not have a right as a matter of right.
>
> The cases to which I have had access since that matter was presented to me yesterday bear that out. It is the court's understanding that Mr. Fitzgerald will make all arguments of fact and the opening statement to the jury on behalf of Mr. Duke, and Mr. Duke's participation in the trial except as he will participate as a defendant and as a witness, if he so chooses, will be he will be here as a defendant. He may be a witness, if he so elects, and the Court will permit him to participate in the cross-examination of witnesses or in the direct examination of witnesses to the extent that we will continue to recognize the rule that there shall be but one counsel for a side or party as to any one witness.
>
> So if Mr. Duke undertakes to cross-examine a witness, Mr. Fitzgerald will not. If Mr. Fitzgerald undertakes to do the examining, Mr. Duke will not participate in it, as to that particular witness.
>
> * * * * *
>
> Now, in this case if we get into argumentative examination of witnesses, the sort of thing that a defendant's natural interest in the case

will tempt him to do, then I will not permit further examination of witnesses by Mr. Duke. As long as the examination conducted by Mr. Duke remains entirely an examination, free from argument, then Mr. Duke may participate in the examination to the extent the Court has indicated.

Are there any other matters we should take up before the jury comes in?

Mr. DUKE. If it please the Court, for the record, may I note an exception to the court's ruling to the extent that I cannot make an opening statement on my own behalf? I indicated——

The COURT. * * * I understand you want to make an opening statement, you want to argue the case.

Mr. DUKE. No, I do not want to argue the case, your Honor.

The COURT. You can't make an opening statement, either.

Mr. DUKE. I only want to make an opening statement because I alone am prepared——

The COURT. That is your misfortune, Mr. Duke. You have been under indictment here for months, and to come to court with only yourself prepared, knowing the law or being trained to know it, is just something you are going to have to live with. Now, you get Mr. Fitzgerald educated as to the facts.

I know academically you are educated, Mr. Fitzgerald, but as to the facts, if you are not well prepared, you proceed last and I will see there is ample recess so that Mr. Duke can write it out, if he wants.

But we are not going to have him stand before the jury and make the statement.

Mr. DUKE. If Mr. Fitzgerald withdrew from the case I would be permitted to proceed in pro per?

The COURT. I am not going to permit him to withdraw at this time. You started out with him and you are going to have to live with the fact you have an attorney here, Mr. Duke.

Mr. DUKE. I didn't start out with him.

The COURT. Well, so far as these proceedings that commenced yesterday are concerned, you did. Didn't you move that he be made your attorney here?

Mr. DUKE. I moved he be associated as co-counsel. And I explained the reason for that was there were certain awkward situations that would arise when a person represents himself, and Mr. Fitzgerald had volunteered to come down and give me assistance, particularly in arguing to the jury and in examining myself when I took the witness stand. That is what I pointed out.

I have appeared at all times for myself and have made it plain to the United States Attorney and to the court at all times that I intended to represent myself in this matter.

The COURT. It wasn't made very plain to me. I came down a week ago Monday to hear a motion for continuance. You appeared, but Judge Weinberger said at the trial you would be represented by counsel.

Now, it is true he said that off the record, and nothing was said to indicate that that was not going to be true.

ARGUMENT

At the very beginning, when arguing the pretrial motions, petitioner gave the judge who was then presiding every reason to believe that he would be represented by counsel at the trial. This belief was conveyed to the judge who was to try the case. Two days before trial Mr. Fitzgerald, acting on petitioner's behalf, moved for permission to interview witnesses held in the custody of the marshal, without suggesting that his role in the trial would be limited in any way. Thus, as matters stood at the beginning of the day on which the jury was to be chosen, the visiting trial judge had every reason to, and did, believe that petitioner would be represented by counsel.

At a conference between the judge, counsel for the parties, and petitioner on that date, petitioner first expressed to the judge his desire both to have an attorney and to represent himself. Specifically, petitioner wanted personally to argue such motions of law as might arise and examine one or two witnesses (*supra*, pp. 8–9). He wanted Mr. Fitzgerald to make the closing argument (*supra*, pp. 5–6, 8). Later that day petitioner expressly moved to have Mr. Fitzgerald associated as co-counsel (*supra*, p. 10). The court gave petitioner permission to associate Mr. Fitzgerald and personally argue motions of law. The following morning, the day trial began, the judge gave petitioner permission to examine witnesses, and stated that it was his understanding that Mr. Fitzgerald would make all arguments of fact and the opening statement on behalf of petitioner (*supra*, p. 11). It was at this point that peti-

tioner objected and sought to discharge Mr. Fitzgerald, even though the judge had stated that if Mr. Fitzgerald was not prepared to make an opening statement, he could proceed last and an ample recess would be granted so that petitioner could familiarize Mr. Fitzgerald with the facts or write out an opening statement (*supra*, p. 12).

Petitioner argues (Pet. 15) that this case is one where the judge encroached bit by bit on his right to represent himself until petitioner was driven to demand the whole of the right. But, as the facts set forth above demonstrate, petitioner first brought Mr. Fitzgerald into the case and then led the judge to make concession after concession. The judge, in all of his rulings, was striving to obtain an orderly trial and to insure that justice would be done for all parties.

In view of the trial court's ruling permitting petitioner to examine witnesses and argue motions, there were only two phases of the case wherein petitioner was not permitted to represent himself—the opening statement and the closing argument. Both are stages of a trial where the personal involvement of the defendant would almost inevitably affect his presentation, and it is not unlikely that the petitioner would have made an argumentative opening, rather than a reasoned statement of the alleged facts. As to the closing argument, petitioner himself agreed that it would be awkward and unwise if he were to make the closing argument after taking the stand as a witness (*supra*, pp. 6, 8). He indicated that Mr. Fitzgerald was introduced into the case primarily to handle the closing argument (*supra*, p. 8). That he did not

agree that the same considerations also entered into opening argument does not alter the fact that this was a reasonable ruling by the trial judge in dealing with the situation of an attorney-defendant who wanted both to have the benefit of counsel and to defend himself.

While an accused may waive his constitutional right to counsel (*Adams* v. *McCann*, 317 U. S. 269, 279) the trial judge did not err in refusing to permit defendant to embark on "* * * the well-nigh suicidal course of attempting to go on with the case alone" unless there was reason to believe that petitioner could have presented his defense better had he acted in person rather than through his counsel. *United States* v. *Mitchell*, 138 F. 2d 831, 832 (C. A. 2), certiorari denied, 321 U. S. 794. A defendant who has appeared by counsel does not have an absolute right to discharge or change his attorney at trial. *United States* v. *Mitchell, supra*; *McDonald* v. *Hudspeth*, 113 F. 2d 984, 985–986 (C. A. 10). Here the trial judge, who had the parties before him, drew a reasonable balance between the right of the defendant to represent himself and to be represented by counsel.[2]

[2] The cases of *Chandler* v. *Fretag*, 348 U. S. 3, and *Smith* v. *O'Grady*, 312 U. S. 329, are of no aid to petitioner in this case. They both hold that the denial of an opportunity to obtain counsel is a denial of due process. Both point up the necessity and wisdom of having counsel. Neither suggest that a defendant who is a lawyer and is also represented by counsel may alone direct the extent of his, the defendant's, participation in the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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